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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 298, 299, 314, 315 & 394

LEO ZITTMAN (with whom The Chase National Bank of the City of New York was impleaded below),
Petitioner,

against

J. HOWARD MCGRATH, Attorney General, as Successor to the Alien Property Custodian,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND ANNEXED BRIEF IN SUPPORT THEREOF

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Leo Zittman, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment of that court, dated June 2, 1950, made in the above cause.

This petition is a companion to the petition filed concurrently herewith, entitled "Leo Zittman (with whom the Federal Reserve Bank of New York was impleaded below),

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[1] J. Howard McGrath was substituted in the Court of Appeals for Tom C. Clark, as Attorney General.

petitioner, against J. Howard McGrath, Attorney General, as Successor to the Alien Property Custodian, respondent".[2] For purposes of convenience, the latter will be referred to as the "Federal Reserve case".

Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 82 F. Supp. 740. The opinion of the Court of Appeals for the Second Circuit is *per curiam* and is reported at 182 F. 2d 349 (IIR p. 99).[3]

Jurisdiction

The judgment below was rendered June 2, 1950 (IIR p. 100). Petition for rehearing was filed June 15, 1950, and denied on June 27, 1950 (IIR p. 121). Jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1254. The original record and requisite copies are on file in this Court.

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[2] The instant case and the Federal Reserve case were brought to test the validity of a New York State court attachment levied, in a single action brought by petitioner, upon certain bank accounts maintained by two German banks with the Chase National Bank of the City of New York and the Federal Reserve Bank of New York. Though there was but one action in the state court, respondent filed two separate proceedings in the District Court. One related to the attached accounts maintained with the Chase Bank. The other related to the attached accounts maintained with the Federal Reserve Bank. Each bank was a party to only that proceeding in the District Court which involved the particular accounts maintained with it. Though the two cases were heard on separate records and briefs and resulted in separate judgments below, they were dealt with by a single opinion both in the District Court and in the Court of Appeals. Neither bank appealed from the judgments of the District Court.

[3] The record in the instant case and in the Federal Reserve case have been bound together and designated Parts I and II, respectively. Record references are as follows: "IR" refers to the record of the instant case; "IIR" refers to the record of the Federal Reserve case. Except where indicated otherwise, references are to folios.

Statutes Involved

1. The Congressional Joint Resolution of May 7, 1940, amending § 5(b) of the Trading with the Enemy Act and the relevant portions of Executive Order 8389, as amended, issued pursuant thereto. Appendix, pp. 23-24.

2. The New York Civil Practice Act, the relevant portions of which appear in Appendix, *infra*, pp. 26-30.

3. The New York Judiciary Law, the relevant portions of which appear in Appendix, *infra*, p. 26.

Nature of the Proceeding

This is a test case brought by respondent, as successor to the Alien Property Custodian, to establish a precedent for the disposition of a large number of similar cases still pending.[3a]

This case presents for determination the rights acquired by an American citizen by reason of a pre-war suit brought by him in a New York State court against two German banks.[3b] Petitioner, unable to obtain personal service of process upon the non-resident German banks (IR. 202), sued them in the state court by attaching certain bank accounts maintained by the German banks with the Chase National Bank of New York City (hereinafter called "Chase Bank"). These bank accounts were then blocked under the freezing controls of Executive Order 8389 (5 F. R. 1400). Petitioner attached on December 11, 1941 and took judgment on March 27, 1942.

[3a] Respondent's counsel so stated in the District Court. In New York County alone there are still pending some 49 such cases involving more than $16,548,328.26. Appendix, p. 32.

[3b] The Reichsbank and the Deutsche Golddiskontbank, hereinafter referred to as the "German banks."

In October, 1946, almost five years after the attachment, respondent [4] vested the right, title and interest of the German banks in the attached bank accounts. Some sixteen months later, respondent asserting, in effect, that the attachment was void as against the German banks—whose rights he was seeking to enforce—because the funds levied upon had been blocked by the freezing controls of Executive Order 8389, petitioned the District Court for the Southern District of New York for a declaratory judgment decreeing, in effect, that, because of the freezing controls, petitioner's attachment was void and that the German banks—and respondent as their successor—were entitled to the attached funds.

The District Court granted the relief sought by petitioner and the Court of Appeals for the Second Circuit has affirmed.

Questions Presented

1. Whether an attachment of blocked funds for jurisdictional purposes, in aid of an action brought by an American citizen against a non-resident blocked national, is void notwithstanding respondent's concession in this case (IR 263-265) that, under Presidential Executive Order 8389, "the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden" by the freezing controls "but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action".

2. Whether petitioner's attachment of frozen funds on December 11, 1941, was an event which gave rise to valid

[4] The terms "respondent" and "Custodian" are used interchangeably to refer either to the Alien Property Custodian or to the Attorney General who succeeded to the Custodian's power and duties. Executive Order No. 9788, 1 C. F. R. 1946 Supp. 169.

rights and liabilities within the purview of *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, decided June 5, 1950, or whether petitioner's attachment was a nullity. In other words, is the instant case controlled by *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran, supra*, or by *Propper* v. *Clark*, 337 U. S. 472? This question is presented squarely here by the following *per curiam* opinion below:

"Per Curiam:

Decree of the District Court, 82 F. Supp. 740, affirmed as to the appellants Zittman and McCarthy on the authority of *Propper* v. *Clark*, 337 U. S. 472, and as to the appellant Sheriff of the City of New York on the ground stated in the opinion below."

3. Whether the holding below, by nullifying the rights vested in petitioner by his attachment and the ensuing judgment, deprives petitioner of his property in contravention of the Fifth Amendment to the Federal Constitution.

4. Whether the District Court should have declined to entertain this cause because—

a) this proceeding was an unwarranted collateral attack on petitioner's state court judgment, in violation of the full faith and credit clause of the Federal Constitution;

b) this proceeding precipitated a conflict of jurisdiction over a *res* in violation of the settled rule of comity between state and federal courts; and

c) a full and adequate remedy was available to respondent in the state court.

Specification of Errors

The court below erred—

1. In holding that petitioner's attachment and judgment were nullities and in refusing to hold that the same are valid.

2. In holding that this case was controlled by *Propper* v. *Clark*, 337 U. S. 472, instead of *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841.

3. In refusing to hold that the District Court should have refused to entertain this cause.

4. In affirming the judgment of the District Court and refusing to reverse such judgment and direct dismissal of respondent's petition.

Summary Statement of the Matter Involved

The facts are undisputed (IR 292). They comprise (a) the circumstances attending the advent of the freezing controls of Executive Order No. 8389 and the extent to which the controls were applied to attachment actions generally and (b) the particular facts of petitioner's state court attachment and of respondent's attempt to vest the attached property.

A.

It is conceded that the attachment of blocked funds was authorized under the freezing controls.

Executive Order 8389 (5. F. R. 1400) created the freezing controls. It was issued on April 8, 1940, under the authority of Sec. 5(b) of the Trading with the Enemy Act. Its purpose was to protect against German conquest securities and credits, located here, belonging to Norway and Denmark and their nationals. By Congressional Joint Resolution, enacted on May 7, 1940 (54 Stat. 179), this

use of the power given to the President was confirmed and clarified.[5]

As Axis conquest progressed, the President extended the scope of the Executive Order until, on June 14, 1941, it applied to nationals of most of continental Europe, including Germany (Exec. Order 8785, 6 F. R. 2897).

At all of the times material here, the Secretary of the Treasury administered the freezing controls under a delegation of power by the President (Exec. Order 8389, Sec. 7). The controls were under Treasury administration when petitioner attached the bank accounts here in question.

Executive Order 8389, Sec. 1, prohibited specified transactions in blocked property unless "authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses or otherwise". Although the Executive Order did not include litigation among the categories of controlled transactions, nonetheless the Secretary of the Treasury was besieged by applications from prospective litigants for licenses to attach blocked funds.[6] In response to these many requests, the Secretary ruled, from the very inception of freezing controls, that no license was needed because the attachment of blocked funds was not forbidden by the controls but that, if the plaintiff recovered a judgment, a license would be required before the blocked funds could be paid to satisfy the judgment. The parties have so stipulated here. Following are portions of the formal stipulation of fact in this case (IR 263-266):

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[5] After the United States entered the war, the President's power over alien-owned property was expanded by the First War Powers Act, passed December 18, 1941 (55 Stat. 839), which further amended Sec. 5(b) of the Trading with the Enemy Act. Because the First War Powers Act came after petitioner's attachment, neither this Act nor the regulations or rulings issued thereunder—as, for example, General Ruling No. 12—are relevant here. *Propper* v. *Clark*, 337 U. S. 472, 485; Brief, *infra*, pp. 45-46.

[6] Such applications ran "into the hundreds". Brief (p. 39) of the Treasury Department as *amicus curiae* in *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332.

"5. From the inception of 'freezing' controls, all litigants who, prior to commencing attachment actions against funds belonging to blocked nationals, had requested the Secretary of the Treasury to license an attachment, or levy, received from the Treasury Department a response of the following nature:

> Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.

"6. From the inception of 'freezing' controls, the Secretary of the Treasury in administering the 'freezing' control program adopted the position, in response to numerous requests made of him, that the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action.

"7. The Treasury Department has at various times issued licenses authorizing payment out of a blocked account of a blocked national for the purpose of making payment on a judgment recovered in an action where a prior warrant of attachment was issued and levied upon the blocked account of a blocked national therein notwithstanding that a particular license to institute the action and levy the attachment was not procured by a plaintiff and judgment-creditor. **A license to institute the action and levy the attachment was in fact not required by the Treasury Department.**" (Emphasis supplied.)

B.

Petitioner's state court attachment.

On December 11, 1941, before war was declared against Germany, petitioner Zittman, a resident citizen of the United States, sued in the Supreme Court of the State of New York for Kings County on a claim against the two German banks (IR 197-198).

Both German banks were foreign corporations with offices in Germany; neither was amenable to personal service (IR 202). Petitioner, being unable to sue *in personam*, proceeded by attachment. On December 11, 1941, a warrant of attachment issued out of the Supreme Court for Kings County, New York, to the Sheriff. The Sheriff levied upon the blocked accounts maintained by the two German banks with the Chase Bank by serving a certified copy of the warrant on the Chase Bank on December 11, 1941, at 2:41 P. M., E. S. T. (IR 198-199, 269).[7] Service of the warrant effected a seizure of all of the rights of the German banks in the attached accounts (N. Y. *Civil Practice Act*, Sec. 916[3]).

In response to the warrant, the Chase Bank certified to the Sheriff those credits, totaling $57,005.33, and securities which it held for the German banks and reported that the same were held by it "subject to Executive Order No. 8389, as amended" (IR 234-235). The attached property continues—to this day—to be held subject to the Federal freezing controls (IR 20).

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[7] Petitioner attached on December 11, 1941, at 2:41 P. M., E. S. T. —before war with Germany began on December 11, 1941, at 3:05 P. M., E. S. T. (55 Stat. 796). On the same day, at 2:20 P. M., E. S. T., the Sheriff had made like service on the Federal Reserve Bank of New York (IIR 192-3, 230, 97-101). The Federal Reserve levy attached certain accounts of the Reichsbank only. Apparently, the Federal Reserve held no credits or property for the Golddiskontbank. The attachment in the case of the Federal Reserve was made the subject of a separate petition below. The judgment on this latter petition is the subject of a separate petition to this Court for a writ of certiorari, filed simultaneously herewith.

The provisional jurisdiction acquired by the state court attachment was perfected. As required by state law, summons was regularly served on the two German banks by publication and copies of the summons, complaint and other requisite documents were regularly mailed to the Attorney General of the United States on behalf of the two German banks (IR 201-202). Respondent acknowledged receipt of the mailing (IR 203, 260).

Neither of the German banks nor the U. S. Attorney General appeared in the state court action or took any steps therein. On March 27, 1942, petitioner took judgment in the state court action against the German banks for a total of $146,724.40 and costs (IR 204).

Respondent concedes that the state court attachment proceeding was regularly begun and reduced to judgment.

No execution has issued to enforce petitioner's judgment out of the attached blocked property (IR 20). It is agreed by all parties that execution cannot issue until a federal license is granted, under the freezing controls, authorizing application of the blocked funds to payment of the judgment. Pending application for, and issuance of, such a license, petitioner has, from time to time, applied for and secured orders of the state court extending the time within which the Sheriff might sue to reduce the attached funds and property to his possession. These orders have been duly and regularly served on the Chase Bank (IR 208, 108-110). By reason of the service of these orders, the funds and securities continue under attachment (N. Y. *Civ Prac. Act*, Sec. 922). The attachment has never been vacated, released, discharged or otherwise annulled (IR 209, 111).

Almost five years after petitioner attached, the Alien Property Custodian executed two limited vesting orders affecting the attached accounts.

One, Vesting Order No. 7792, was executed October 3, 1946, and purported to vest the right, title and interest of the Reichsbank in its account with the Chase Bank (IR 37-44). The other, Vesting Order No. 7870, was exe-

cuted October 14, 1946, and purported to vest the right, title and interest of the Golddiskontbank in its accounts with the Chase Bank (IR 55-60).[8]

These vesting orders necessitated a determination of the *quantum* of interest remaining in the German banks after the attachment, for it is conceded that only this residual interest was vested by respondent.[9] To secure this determination, respondent instituted the present summary proceeding against petitioner, joining the Chase Bank and the Sheriff.

As already noted, the District Court, upon the authority of *Clark* v. *Propper*, 169 F. 2d 324, held that the attachment was void as to the German banks and that they were entitled to the whole of the attached accounts. It awarded a declaratory judgment to respondent, who claimed only the interest of the German banks under his limited vesting orders (IR 307-316). The Court of Appeals affirmed solely on the authority of *Propper* v. *Clark*, 337 U. S. 472.

REASONS FOR GRANTING THE WRIT

I.

The Holding Below Conflicts with *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, and Other Authorities.

The Second Circuit holds in the instant case that an attachment of frozen funds of a blocked national—though concededly authorized by the Secretary of the Treasury—is void by reason of the freezing controls.

The New York State Court of Appeals held precisely to the contrary in *Commission for Polish Relief* v. *Banca*

[8] The District Court adjudged the orders to be "right, title and interest" vesting orders (IR 312-313).

[9] The limited force of a "right, title and interest" vesting order is discussed hereafter. Brief, *infra*, pp. 33-36.

Nationala a Rumaniei, 288 N. Y. 332, in which the United States Treasury Department appeared as *amicus curiae* and supported the validity of the attachment.[9a] In the *Polish Relief* case the New York State Court of Appeals upheld the right to attach blocked funds, saying at page 338:

> "The Executive Order [8389] did not forbid attachment of the conceded interest of the defendant in the credits upon which the levies were made. For all we know, payment of the blocked accounts to the credit of this action can be permitted consistently with the purpose of the Order. We are not to presuppose that this will inevitably be refused in the event of a judgment for the plaintiff (Cf. *Simpson* v. *Jersey City Contracting Co.*, 165 N. Y. 193, 200). The lien of an attachment is always hypothetical in some degree. A 'seizure subject to license' was, we think, sufficient for the purpose of jurisdiction *in rem* over the deposits in question."

Other cases, both state and federal, have held to the same effect.

> *Feuchtwanger* v. *Central Hanover Bank & T. Co.*, 288 N. Y. 342 (decided the same day as the *Polish Relief* case).
>
> *Singer* v. *Yokohama Specie Bank*, 293 N. Y. 542, 299 N. Y. 113, 299 N. Y. 791, aff'd 339 U. S. 841.
>
> *Sun Insurance Office, Limited* v. *Arauca Fund*, 84 F. Supp. 516.
>
> *Metallo-Chemical Corp.* v. *Banque Transatlantique S.A.*, 188 N. Y. Misc. 596.

So far as we can determine, only the instant case has held otherwise.

The conflict between the instant case and the *Polish Relief* case is accentuated here because the two courts reached opposite conclusions upon the same facts. In both

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[9a] The Treasury supported the validity of the attachment even though it had refused specifically to license the attachment.

courts the United States conceded, in almost identical language, that the Secretary of the Treasury, in administering the freezing controls, authorized the attachment of frozen funds.[10]

The New York State Court of Appeals, in the *Polish Relief* case, construed the Treasury's ruling to mean that blocked funds may be attached to found jurisdiction and the action reduced to judgment, subject to a license under the federal controls as a condition precedent to payment of the attached blocked funds in satisfaction of the judgment. The courts of the State of New York have consistently adhered to this view of the controls in dealing with litigation involving property of blocked nationals. The litigation has been permitted to proceed, but pay-

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[10] Compare the stipulation of fact in the instant case (IR 263-266) with the following quoted from the brief of the United States as *amicus curiae* (p. 39) in the *Polish Relief* case:

> "From the very inception of freezing control, litigants, prior to commencing attachment actions against funds belonging to blocked nationals, have requested the Secretary of the Treasury to license a transfer to the sheriff by attachment. In all those cases running into the hundreds, the Treasury Department has taken a consistent position. The Treasury Department has authorized the bringing of an attachment action. However, the Treasury Department has not licensed a transfer of the blocked funds to the sheriff prior to judgment.
>
> "In response to requests that a license be issued to transfer the attached funds prior to judgment, the Treasury Department has, in practice, made a statement of the following nature:
>
> Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.
>
> **"From the terms of the statement, it may be clearly seen that the Secretary of the Treasury authorized the bringing of an attachment action.** * * * *" (Emphasis supplied.)

ment of the judgment has been made to await the sanction of a federal license under the freezing controls.[11] Within the last few months, this Court has approved this construction of the freezing controls. *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, decided June 5, 1950.

The Second Circuit, however, adheres to a contrary view. In its view, transactions in frozen funds are wholly void. No proceedings may be maintained to create or enforce rights arising out of such transactions—irrespective of the admitted Treasury authority sanctioning such proceedings—unless specifically licensed. In addition to the instant case, the Second Circuit has so held in *Clark* v. *Propper*, 169 F. 2d 324, and *Bernstein* v. *N. V. Nederlandsche-Amerikaansche*, etc., 173 F. 2d 71.

The essential difference between the position of the two courts is that the New York State Court of Appeals—in accordance with the Treasury's ruling—requires that a license be procured after judgment as a condition precedent to satisfaction of the judgment. The Second Circuit—contrary to the Treasury's ruling—requires a license before the court may even adjudicate.

The conflict between the two courts creates the anomaly of judgments, resting upon attachment, which are valid in the state courts of New York but void when brought into question in the federal courts of New York. Thus, petitioner's state court judgment is valid under the *Polish*

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[11] *Singer* v. *Yokohama Specie Bank*, 293 N. Y. 542, 299 N. Y. 113, in which the U. S. appeared as *amicus*, aff'd 339 U. S. 841; *Leeds* v. *Guaranty Trust Co.*, 65 N. Y. S. 2d 431, aff'd 272 N. Y. App. Div. 909, aff'd 297 N. Y. 1019, in which the U. S. appeared as *amicus*; *Feuchtwanger* v. *Central Hanover Bank & Trust Co.*, 288 N. Y. 342; *Metallo-Chemical Corp.* v. *Banque Transatlantique S. A.*, 188 N. Y. Misc. 596; *Bollack* v. *Societe General, etc.*, 263 N. Y. App. Div. 601; *R. & L. Goldmuntz, Sprl.* v. *Fisher*, 54 N. Y. S. 2d 635; *Drewery* v. *Onassis*, 188 N. Y. Misc. 912, 914, aff'd 272 N. Y. App. Div. 870; *Cable & Wireless, Ltd.* v. *Yokohama Specie Bank*, 191 N. Y. Misc. 567; *Suomen Pankki* v. *Bell*, 80 N. Y. S. 2d 821, 829.

Relief case and under this court's holding in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841. It is void under the holding below.

Also, the conflict between the two courts places an attachment debtor in the impossible position of being adjudged by the federal court to owe the attached funds to the blocked national and, at the same time, of being in contempt of the state court if he pays to the blocked national or to respondent as his successor. N. Y. *Civ. Prac. Act*, Sec. 917(2); N. Y. *Judiciary Law*, Secs. 750(3), 753(3), 753(8).

Moreover, the holding below establishes a startling and novel doctrine. The rights of the enemy German banks—asserted here by respondent—are permitted to prevail over the pre-war attachment of petitioner, an American citizen. As construed below, the freezing controls cloak the German banks with immunity from attachment of their property by American citizens. So construed, the controls are distorted from a check upon the enemy to a check upon American citizens.

Certiorari is necessary to eliminate these incongruous results. It is needed for another important reason. The holding below cannot be made effective without a further proceeding in the state court in whose custody and control the attached property now rests. Respondent admits that he must now ask the state court to enforce the judgment below by acknowledging the invalidity of its custody, vacating its attachment and injunction and surrendering the attached property to him. Since the judgment below attempts to adjudicate the state court's title to property in the latter's custody and control, the state court may refuse to recognize the judgment below. *Ex parte Baldwin*, 291 U. S. 610, 615-615; *Lion Bonding & S. Co.* v. *Karatz*, 262 U. S. 77, 89; *Peck* v. *Jenness*, 7 How. (U. S.) 612, 624-626; *Leadville Coal Co.* v. *McCreery*, 141 U. S. 475-477; *Nogue* v. *Clapp*, 101 U. S. 551.

Instead, the state court may choose to follow the *Polish Relief* case and the holding of this Court in *Lyon* v. *Singer*,

under which petitioner's attachment and judgment are valid. Such a choice would leave petitioner and respondent in hopeless confusion as to their respective rights. It would project the state and federal courts into an unseemly and irreconcilable conflict. This result can be avoided if certiorari is granted and the rights of the parties are finally determined by this court. Such a determination would also serve as a guide for the disposition of the many cases of attached frozen funds still pending. In New York County alone there are forty-nine such cases, involving $16,548,328.26. Appendix, pp. 30-33.

II.

The Holding Below Conflicts with This Court's Holding in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, Decided June 5, 1950.

On June 5, 1950, three days after the holding below, this Court decided *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*. Petitioner, by petition for rehearing, noted the conflict between the holding below and the *Singer* and the *Mellie Iran* cases. The court below, without opinion, denied rehearing (IIR p. 121).

In the *Singer* and *Mellie Iran* cases the New York State Court of Appeals followed the *Polish Relief* case. It held that an unlicensed voluntary transaction, in blocked Japanese funds, gave rise to valid rights in the transferee of the blocked property such as would enable him to assert a valid preferred claim (enforceable *in rem*, *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, 412) against the property of the blocked national (Yokohama Specie Bank) in liquidation proceedings conducted by the N. Y. Superintendent of Banking. It held, further, that the claim could not be paid until the payment was screened by license under the federal freezing controls (293 N. Y. 542, 299 N. Y. 113). The freezing controls, it said, "did not prevent the accrual or creation of the claim sued upon or render such

claim void, but merely prevented the payment of the claim until an appropriate federal license is obtained" (299 N. Y. 790, 791).

This court, by affirming the *Singer* and *Mellie Iran* cases,[11a] sanctioned these views and rejected the very arguments—made in those cases by respondent as *amicus*—which were advanced by respondent below. We believe it is fair to say that this court, in affirming these cases,

1. has approved the position of the New York Court—first espoused in the *Polish Relief* case—that the freezing controls did not prevent the accrual of rights based upon transactions in frozen funds so long as the transactions were not consummated until licensed, i.e., "screened and found to be consonant with the national interests", and

2. has, in effect, approved the doctrine of the *Polish Relief* case and rejected the doctrine of the holding below, which is directly to the contrary.

Petitioner's case not only parallels *Singer* and *Mellie Iran* but, in a decisive aspect, is decidedly stronger. In *Singer* and *Mellie Iran* the blocked transaction which was enforced was a voluntary one between two blocked nationals, "the foreign office of the Yokohama bank and Standard's Japanese office, both nationals of Japan, and was to be performed at the direction of the foreign bank" (299 N. Y. 113, 123). The transaction was wholly unauthorized under the freezing controls. Here, petitioner, an American citizen, attached the funds of the German banks *in invitum* and pursuant to admitted Treasury authority.

If, in *Singer* and *Mellie Iran*, the *unauthorized* transaction there involved gave rise to enforceable rights, it follows, *a fortiori*, that petitioner's attachment, *authorized under the freezing controls*, gave rise to a valid attach-

[11a] This Court upheld Singer's claim even though the Secretary of the Treasury twice refused to license the transaction upon which it rested.

ment lien. In deciding to the contrary, the court below held directly in conflict with the *Singer* and *Mellie Iran* cases. There is no reason why the unauthorized voluntary transactions between blocked nationals in *Singer* v. *Lyon* should stand on firmer ground than petitioner's federally authorized attachment effected here under the supervision of the state court. Such supervision would insure a more perfect adherence to the purpose of the controls than could possibly be achieved by the parties in the *Singer* and *Mellie Iran* cases in their voluntary unsupervised and unauthorized dealings.

In choosing *Propper* v. *Clark*—instead of the *Singer* and *Mellie Iran* cases—as its guide, the court below overlooked the fundamental distinctions which deny the application of the *Propper* case here. Propper "claimed title to frozen assets adversely to the Custodian and sought to deny the Custodian's paramount power to vest" (339 U. S. 841, 842-843). Here, petitioner did neither.

Firstly, petitioner claimed only the attachment lien which—under New York law and generally—left title to the attached funds undisturbed and in the German banks (Brief, *infra,* p. 51).

Secondly, here, as in the *Singer* and *Mellie Iran* cases, the Custodian's "paramount power to vest" was not in issue. The Custodian's vesting orders here were limited ones. They extended only to the right, title and interest remaining in the German banks in the attached accounts after giving effect to petitioner's attachment. It is admitted that the Custodian's limited vesting orders invited an adjudication of petitioner's interest in the accounts by reason of the attachment.[12] And the Custodian so intended. Had

[12] In his brief in the District Court (p. 4) respondent said:

"Vesting Orders Nos. 7792 and 7870 in issue on this Petition vested the debts or other obligations arising out of bank accounts in the names of Deutsche Reichsbank and Deutsche Golddiskontbank maintained by the Chase National Bank, leaving open for subsequent judicial determination the amount of the debts actu-

he issued *res* vesting orders determining that the attached accounts were enemy property in their entirety and demanding the whole of the accounts, these unlimited vesting orders and demands would have been incontestable. However, such vesting orders would have left petitioner free to assert and enforce his attachment lien, as against the Custodian, in a proceeding under Sec. 9 of the Trading with the Enemy Act. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 569; *Stoehr* v. *Wallace*, 255 U. S. 239, 245-246. By choosing to vest only the right, title and interest of the German banks, the Custodian waived his right to immediate preliminary custody of the vested property and invited an adjudication which would—and here does—preclude a later Section 9 suit by petitioner. Since the Custodian deliberately chose not to put in issue his paramount power to vest by means of *res* vesting orders, there is no parallel between the instant case and the *Propper* case.

On the contrary, this case is precisely like the *Singer* and *Mellie Iran* cases. In those the Custodian vested the assets of the New York agency of the Yokohama Specie Bank "in the hands of the Superintendent remaining after the payment by the Superintendent of the creditors entitled to share in the liquidation of the New York Agency" (299 N. Y. 113, 125). This parallels, precisely, the scope of the vesting orders in the instant case which extends to the residue remaining in the Chase accounts of the German banks after giving to petitioner's attachment the force required by law.

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ally owing to the German banks, and the valid ownership interests, if any, acquired in the accounts by third persons. In fine, the Custodian purported to vest only whatever interest the German banks might have had in the account, for there was no finding, that prior to vesting, the German nationals were in truth entitled to the entire balances of the accounts as stated on the books of the Chase National Bank. While demand letters (Exhibits D and F) were served by the Custodian upon the Chase National Bank, these demands are not regarded by the Attorney General as equivalent to the customary Turn-over Directives which, if issued in this case and taken together with the 'interest' Vesting Orders, would have been considered as giving him title to a specific *corpus* represented by the accounts."

It is respectfully submitted that certiorari be granted to eliminate the conflict between the holding below and the *Singer* and *Mellie Iran* cases.

III.

The Holding Below Subjects to Possible Double Liability Every Attachment Debtor Who Has Satisfied a Judgment Out of Attached Blocked Funds.

Respondent argued successfully below that, though the Treasury authorized the attachment of blocked funds, such an attachment would be wholly ineffective until payment of the ensuing judgment were licensed. The Treasury's post judgment license, he claimed, would validate the authorized—though void—attachment, *ab initio*.

The Constitution forbids this view. Under the Fourteenth Amendment, as construed in *Pennoyer* v. *Neff*, 95 U. S. 714, a judgment against a non-resident, resting on constructive service, is valid only if property has been seized, as by attachment, at the commencement of the suit and only to the extent of the property so seized. In the absence of such a seizure, the judgment is void. It cannot be validated by post-judgment events.

In *Pennoyer v. Neff, supra*, this Court decided that, only because the attachment has seized the property at the outset of the action and brought it under the control of the court, does the Federal Constitution permit a judgment binding the property seized. The power of the court to adjudicate "at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment". *Pennoyer v. Neff, supra*, p. 728. To paraphrase *Pennoyer* v. *Neff, supra*, p. 78, "The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid" if licensed by the Treasury under the freezing controls and "void if there be" no license.

Since, under *Pennoyer* v. *Neff*, the validity of the judgment rests upon federal constitutional requirements and since these demand a valid attachment at the inception of the suit, the lower court's view of the freezing controls as precluding such an attachment would make it impossible to have a valid judgment based upon an attachment of blocked funds. A post-judgment Treasury license could, in no way, cure the constitutional defect. The holding below is an invitation to every blocked national, whose blocked funds have been applied to satisfy a judgment secured by attachment of those funds, to sue his creditor and the Sheriff for having paid on a void judgment. The potential double liability is large. In New York County alone more than $2,000,000 have been paid out of attached blocked funds to satisfy such judgments (Appendix, pp. 31-32).

We respectfully submit that it is of first importance that certiorari be granted so that the validity of an attachment of frozen funds may be finally determined. Such a determination will set at rest the doubts raised by the holding below as to the validity of judgments already satisfied. Also, it will furnish a final guide for disposition of the many pending attachment cases of which some 49 are pending in New York County alone (Appendix, pp. 31-32).

IV.

Under Settled Rules of Law the District Court Should Have Refused to Entertain This Cause.

The District Court, by its judgment, has voided the state court judgment and the attachment upon which it rests. Had the German banks sued in the District Court to invalidate the state court judgment and attachment, the District Court would have been bound to refuse to entertain the suit because—

(a) the state court judgment was immune to collateral attack under the full faith and credit clause of the Federal Constitution as well as judicial precedent;

(b) in deference to the traditional rule of comity between state and federal courts in contests over a *res*, the district court could not interfere with the state courts' custody and control of the attached debts, made effective here by statutory injunction;

(c) an adequate summary remedy was available in the prior state court proceeding.

Respondent was similarly limited since he had seized only the right, title and interest of the German banks and was in privity with them.

To avoid duplication, we respectfully refer the Court to the law applicable to this point which is fully discussed in the annexed Brief, *infra*, pp. 54-61.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the U. S. Court of Appeals for the Second Circuit, commanding said Court to certify and send up to this Court a full and complete transcript of the record, and of all proceedings in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of said Court of Appeals be reversed; and that petitioner may be granted such other and further relief as may be just and proper.

Respectfully submitted,

JOSEPH M. COHEN,
Attorney for Petitioner,
36 West 44th Street,
New York 18, N. Y.

APPENDIX

1. Joint Resolution of May 7, 1940, 54 Stat. 179

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

* * * * * * *

2. Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order No. 8785, June 14, 1941, 6 F. R. 2897

SECTION 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * * * *

3. General Ruling No. 12, April 21, 1942, 7 F. R. 2991

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury (a) any transfer after the effective date of the Order [Exec. Order No. 8389] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (b) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

* * * * * * *

(3) Unless otherwise provided an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5(b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated: *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

* * * * * * *

4. **New York Judiciary Law**

§ 750. Power of courts to punish for criminal contempts.

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

* * * * * * *

3. Wilful disobedience to its lawful mandate.

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§ 753. Power of courts to punish for civil contempts.

A. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:

* * * * * * *

3. A party to the action or special proceeding, an attorney, counsellor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court.

* * * * * * *

8. In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.

5. **New York Civil Practice Act**

§ 520. Judgment against non-resident enforceable only against attached property.

Where a defendant who has not appeared is a non-resident of the state, or a foreign corporation, and the summons was served without the state, or by publica-

tion pursuant to an order obtained for that purpose, the judgment can be enforced only against the property which has been levied upon by virtue of a warrant of attachment at the time when the judgment is entered. But this section does not declare the effect of such a judgment with respect to the application of any statute of limitation.

§ 645. Requisites of execution where warrant of attachment levied.

Where a warrant of attachment issued in the action has been levied by the sheriff, the execution must substantially require the sheriff to satisfy the judgment as follows:

1. Where the judgment debtor is a non-resident, or a foreign corporation, and the summons was served upon him or it, without the state, or otherwise than personally, pursuant to an order obtained for that purpose, and the judgment debtor has not appeared in the action; out of the personal property attached, and, if that is insufficient, out of the real property attached.

§ 916. The attachment may also be levied upon:

* * * * * * *

3. A debt, arising under or on account of a contract, not represented by a bond, promissory note or other instrument for the payment thereof, negotiable or otherwise, whether or not the said debt is past due, or yet to become due, to a resident or non-resident person or corporation, from a resident or non-resident person or corporation, upon whom or which service of process may be had within the county, provided that an action could be maintained by the defendant within the state for the recovery of such debt at the maturity thereof or where the debt consists of a deposit of money not to be repaid at a fixed time but only upon a special demand, that such demand therefor could be duly made by defendant within the state. The levy of the attachment thereon is deemed a levy upon, and a seizure of all the rights of the defendant in or to the said debt.

§ 917. A levy under a warrant of attachment must be made as follows:

2. Upon other property subject to attachment, as follows: Where the property consists of a demand, other than as hereinafter specified, by leaving a certified copy of the warrant with the person against whom it exists; * * *.

A levy made by service of a certified copy of a warrant of attachment shall apply to any and all property of the defendant or debt owing to him, or to any interest of the defendant therein or thereto, subject to attachment, held or owed by the person on whom it is served, except that the levy shall not apply to such property, debt or interest, if the said person has no knowledge or reason to believe that the said property or debt belongs, or is owing, to the defendant, or is claimed by him or on his behalf, or that he has, or claims to have, an interest therein, unless such property, debt, or interest therein shall be specified in a writing accompanying the certified copy of the warrant.

Any such person so served with a certified copy of a warrant of attachment is forbidden to make or suffer, any transfer or other disposition of, or interfere with, any such property or interest therein so levied upon, or pay over or otherwise dispose of any debt so levied upon, or sell, assign or transfer any right so levied upon, to any person, or persons, other than the sheriff serving the said warrant until ninety days from the date of such service, except upon direction of the sheriff or pursuant to an order of the court. Any such payment, sale, assignment or transfer shall nevertheless be valid as to the payee or transferee in good faith thereof, and without notice that the warrant has been served.

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§ 922. Actions and special proceedings by sheriff.

1. In the event that the person owing any debt to the defendant, or holding property, effects or things in action of the defendant or interest therein subject to attachment, on which a levy under a warrant has been made, as in this act provided, shall fail or refuse to deliver such personal property attached, or to pay

or assign to the sheriff the said debt, effect or thing in action, or interest therein, the sheriff may, and if indemnified by the plaintiff as hereinafter provided, must, within ninety days after the service of the certified copy of the warrant on such person, commence an action or special proceeding to reduce to his actual custody all such personal property capable of manual delivery, and to collect, receive and enforce all debts, effects and things in action attached by him, and may maintain any such action or special proceeding in his name or in the name of the defendant for that purpose. He may discontinue such an action or special proceeding at such time and on such terms as the court or judge directs. * * *

The service of process commencing such action or special proceeding against any person upon whom a certified copy of a warrant of attachment shall have been served, shall continue as against that person during the pendency of said action or special proceeding all duties and liabilities imposed upon him in the first instance by the service of the said warrant of attachment upon him.

The time within which such action or special proceeding, as hereinbefore provided, may be commenced shall be extended beyond the period of ninety days from the date of the service of the said warrant only by order of the court for good cause shown. Such an order may be granted upon ex parte application of plaintiff. An order thus extending the time within which such an action or special proceeding may be commenced shall be effective to continue all duties and liabilities of any person on whom a warrant of attachment in the action has been served, provided that a certified copy of the said order is served upon said person prior to the expiration of the said ninety days or prior to the expiration of the time for commencing such an action or special proceeding as further extended.

§ 948. The defendant, or the person upon whom a warrant of attachment has been served, or a person who has acquired a lien upon or interest in his property after it was attached, may apply, at any time before the actual application of the attached property

or the proceeds thereof to the payment of a judgment recovered in the action, to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative.

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§ 969. Satisfaction of judgment from attached property.

Where an execution against property is issued upon a judgment for the plaintiff in an action in which a warrant of attachment has been levied, the sheriff must satisfy it as follows:

1. He must pay over to the plaintiff all money attached by him, and the proceeds of all sales of perishable property or of any vessel or share or interest therein, or animals, sold by him, or of any debts, or other things in action collected or sold by him; or so much thereof as is necessary to satisfy the judgment.

* * * * * * *

4. Until the judgment is paid, he may collect the debts and other things in action attached, and prosecute any undertaking, which he has taken in the course of the proceedings, and apply the proceeds thereof to the payment of the judgment.

6. Correspondence between Petitioner's Counsel and the Sheriff of the City of New York

July 25, 1950

Sheriff of the City of New York,
Hall of Records,
New York, N. Y.

Attention: Mr. Posner

Dear Sir:

I am preparing a petition to the Supreme Court of the United States for a writ of certiorari. The case involves the attachment of blocked funds. I desire to place before the Supreme Court the following facts:

(1) The total number of closed cases in New York County in which the Sheriff levied upon blocked

funds and the total sum of money paid out of blocked funds in such cases pursuant to post-judgment Treasury Department licenses.

(2) The total number of cases still pending in New York County in which the Sheriff has levied on blocked funds and the total amount still under attachment.

I shall appreciate it greatly if you will supply me with the mentioned facts.

Very truly yours,

JOSEPH M. COHEN

JMC:ah

CITY OF NEW YORK
OFFICE OF THE SHERIFF
Hall of Records
31 Chambers Street
New York 7, N. Y.
WOrth 2-4300

SIDNEY POSNER
Counsel

August 18, 1950

Joseph M. Cohen, Esq.
36 West 44th Street
New York, 18, N. Y.

Re: McGrath v. Chase National Bank et al.;
McGrath v. Federal Reserve Bank et al.

Dear Mr. Cohen:

In response to your letter of July 25, 1950 in which you requested certain information concerning the attachment of blocked funds, we caused an examination to be made of the records in the New York County division of the Sheriff's Office.

This examination disclosed the following facts:

(1) The Sheriff had attachment levies upon blocked funds in at least 63 cases which were subsequently closed by payments made pursuant to executions upon judgments or court orders. These

payments, amounting to $2,004,075.71, were authorized by Treasury Department licenses.

(2) There is now pending in New York County at least 49 cases in which, pursuant to warrants of attachment, the Sheriff has levied upon blocked funds or property in a reported amount of $16,548,328.26 which does not include certain securities and other property of an undetermined value.

Very truly yours,

SIDNEY POSNER
Counsel

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PETITIONER'S BRIEF

Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 82 F. Supp. 740 (IR 289). The opinion of the Court of Appeals for the Second Circuit is *per curiam* and is reported at 182 F. 2d 349 (IIR p. 99).

ARGUMENT

I.

By Issuing Right, Title and Interest Vesting Orders, Respondent Deliberately Limited His Seizure to the Residual Interest in the Attached Bank Accounts, Remaining in the German Banks After Giving Effect to Petitioner's Attachment. By Issuing Such Limited Vesting Orders, Respondent Chose to Submit to Judicial Determination the Quantum of That Residual Interest and to Forego His Right to Preliminary Custody of the Whole of the Attached Accounts.

Vesting orders are of two kinds. One—the so-called "*res*" vesting order—is a seizure of *designated property*. The other—the "right, title and interest" vesting order—seizes merely the *enemy's interest* in designated property.[1]

[1] "Vesting action by the Custodian may take two forms. He may vest the 'right, title, and interest' of an enemy in and to property or he may issue a *res* vesting order by which he vests the asset itself. In *Stern* v. *Newton*, 39 N. Y. S. 2d 593, 598 (1943), the difference between the two orders was expressed in this fashion: 'Where the Custodian seizes only the right, title

A *res* vesting order is a preliminary seizure. The property is taken by the Custodian irrespective of—but without prejudice to—the rights of others having claims against the property. The Custodian must respect the rights of others to the property as determined by a later suit under Sec. 9 of the Trading with the Enemy Act. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 569; *Stoehr* v. *Wallace*, 255 U. S. 239, 245-246.

A "right, title and interest" vesting order merely places the Custodian in the shoes of the enemy with respect to the designated property. The order is effective only if, and to the extent that, the enemy has an interest in the property. The enemy's interest delimits the Custodian's rights. The vesting order does not contract or enlarge that interest. *Kahn* v. *Garvan*, 263 Fed. 909, 912; *Miller* v. *Rouse*, 276 Fed. 715, 716; *U. S.* v. *The Antoinetta*, 153 F. 2d 138, 143; *Isenberg* v. *Trent Trust Co.*, 26 F. 2d 609, 613, aff'd on rehearing 31 F. 2d 553, cert. den. 279 U. S. 862; *Mayer* v. *Garvan*, 270 Fed. 229, 239; *In re People by Beha, Supt. of Ins.*, 256 N. Y. 177, 187, cert. den. 284 U. S. 633; *U. S.* v. *The San Leonardo*, 51 F. Supp. 107, 109; *The Pietro Campanella*, 47 F. Supp. 374, 377, 380; *Clark* v. *Edmunds*, 73 F. Supp. 390, 392-394; *Chase Nat. Bank* v. *Reinicke*, 76 N. Y. S. 2d 63, 65.

By a "right, title and interest" vesting order, the Custodian elects to have a determination of adverse interests in the property before it is taken into his custody. By a "*res*" vesting order, the Custodian elects to take immediate custody of the property and relegates the adjudication of

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and interest of an enemy national, a question is presented as to the extent of that interest. * * * But where the Custodian vests the particular property, as distinguished from the interest of the enemy national in the property, he takes the entire right, title and interest therein, regardless of the quantum owned by the enemy national.'"

Robert M. Vote, Estates and Trust Branch Office of Alien Property (1949), *Alien Property Litigation in World War II*, p. A-3.

adverse rights to a later suit under Sec. 9 of the Trading with the Enemy Act. *Kahn* v. *Garvan*, 263 F. 909, 912; *Stern* v. *Newton*, 39 N. Y. S. 2d 593, 598.

Here, the vesting orders are clearly of the "right, title and interest" variety. The judgment below so decrees (IR 312-313). Respondent so concedes. Thus, in his brief below (p. 5), respondent said:

> "* * * The orders, however, contain no finding that prior to vesting the German banks were in truth entitled to the entire balances of the accounts as stated on Chase's books. Appellee agrees with appellants that the vesting orders in this case left open for subsequent judicial determination the amount of the debts actually owing to the German banks and the valid ownership interests, if any, acquired in the accounts by third persons. The Custodian has likewise conceded that the demand letters which he served upon Chase (IR 46-54, 64-72) are not equivalent to turn-over directives which, had they been issued in implementation of the vesting orders, would have constituted a determination that a specific designated corpus was enemy property required to be delivered to the federal authorities. * * *"

Since here the Custodian chose to waive his right to immediate custody and to have a judicial determination of adverse rights in the vested property at the outset, the issue is simply this: What interest did the German banks have in the Chase accounts on the effective dates of the vesting orders?

Petitioner says that he validly attached the Chase accounts. The attachment impressed a lien upon these accounts to secure his judgment.[2] Therefore, when the later vesting orders were made, the interest of the German banks in the Chase accounts was limited to the residuum, if any, remaining after satisfaction of his attachment lien. The Custodian took only this residuum—no more.

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[2] See *post* p. 51, note 17.

Respondent would agree, except for the impact of Executive Order No. 8389. In his brief in the District Court he said, "But for the impact of Executive Order No. 8389 as amended, and regulations of the Treasury Department issued pursuant thereto, it is conceded that under the law of New York both the attaching creditors and the Sheriff would have acquired liens on the applicable funds through the attachments and levies". However, he said, "the application of the Executive Order prior to the issuance of the attachment and levies barred the acquisition of any interest by the respondents in the property through judicial process or otherwise".

The merits of the case turn upon whether, under the freezing controls of Executive Order 8389 as applied by the Treasury Department, frozen funds could be validly attached.

II.

The Attachment of Frozen Funds Was Permitted by the Freezing Control Program.

Petitioner attached on December 11, 1941. The levy preceded war with Germany.[3] The Trading with the Enemy Act was not then in force as to Germany.[4] At that time, the Custodian was without power to vest the attached property. The United States, neither directly nor through any agency, did, or could, claim any proprietary interest in the attached accounts.

Petitioner's attachment created no contest between himself and the United States. The parties to the state court litigation were—and remained throughout—petitioner as plaintiff and the German banks as defendants.

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[3] Petitioner attached on December 11, 1941, at 2:41 P. M., Eastern Standard Time (269). War with Germany began on December 11, 1941, at 3:05 P. M., Eastern Standard Time (55 Stat. 796).

[4] See *post*, p. 38, note 6.

Except for the later limited vesting orders, respondent would have no standing to question the validity of the attachment. By these orders, he deliberately chose the status of successor to the rights of the German banks. He asserts their rights as their privy. It is as if the German banks were here contesting the validity of petitioner's attachment made on December 11, 1941. If they could not prevail, neither can respondent.

The German banks could not have employed the freezing controls to defeat the attachment because——

(a) the freezing controls were protection against—not for—German nationals,

(b) in authorizing the attachment of frozen funds, the Secretary of the Treasury must be taken to have sanctioned a valid attachment, and

(c) petitioner's attachment is clearly valid under this Court's holding in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran.*

A.

The freezing controls were designed to protect, against Axis conquest, property here belonging to nationals of the invaded countries. Suits by Americans against frozen property were not proscribed.

The freezing controls rest upon the authority given to the President by Sec. 5(b) of the Trading with the Enemy Act.[5]

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[5] Sec. 5(b) was enacted originally in 1917 as part of the Trading with the Enemy Act [40 Stat. 411, Sec. 5(b)]. It was a catch-all enabling control of transactions not otherwise controlled by that act. The end of the first World War terminated the effectiveness of Sec. 5(b) as well as the other controls of the Trading with the Enemy Act.

Sec. 5(b)—alone—was revised on March 9, 1933, to meet the domestic crisis engendered by the depression. On that day, it was amended so that the powers granted would be available to the President in war or "during any other period of national emergency de-

When Germany invaded Norway and Denmark, the President declared a national emergency. This declaration reactivated his powers under Sec. 5(b) of the Trading with the Enemy Act. It enabled him to employ these powers to protect against German conquest securities and credits located here, belonging to Norway and Denmark and their nationals. The powers conferred by Sec. 5(b) were available to the President in time of "national emergency" as well as during time of war. The remainder of the Trading with the Enemy Act was effective only in war time.[6]

Acting under Sec. 5(b), on April 10, 1940, the President issued Executive Order 8389 (5 F. R. 1400), freezing designated property in the United States in which "Norway or Denmark" or any national thereof has at any time on or since April 8, 1940, had any interest."

To confirm and clarify the President's action, Senator Wagner, at the instance of the Treasury Department, introduced into Congress the Joint Resolution, enacted on May 7, 1940 (54 Stat. 179; Appendix, p. 23).[7] Executive Order 8389 was an exercise by the President of the authority granted by this Joint Resolution. Initially, the Order dealt only with the local assets of Danish and Norwegian nationals. On June 14, 1941, the President extended its application to nationals of Germany, among others (Exec. Order 8785; 6 F. R. 2897). Executive Order 8389 followed,

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clared by the President" (48 Stat, 1). The amendment was directed to the domestic crisis solely. The obvious purpose of the amendment was to enable the President to suspend payments by the banks to prevent the current runs and, thus, to halt the alarming numbers of bank failures.

[6] The remainder of the Trading with the Enemy Act was reactivated as to Germany at midnight, December 11, 1941. *Trading with the Enemy Act*, § 2 (50 U. S. C. A., appendix); *Markham v. Cabell*, 326 U. S. 404, 407n. 2.

[7] H. Rep. No. 2009, 76th Cong. 3rd Sess. 1940; S. Rep. No. 1946, 76th Cong. 3rd Sess. 1940; Sen. Wagner in 86 Cong. Rec., p. 5006.

closely, the language of the Joint Resolution. Sec. 1 of the Order—the portion material here—provides as follows (5 F. R. 1400, as amended June 14, 1941, 6 F. R. 2897):

> "Section 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:
>
> "A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States);
>
> "B. All payments by or to any banking institution within the United States;
>
> * * * * * *
>
> "E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States."
>
> * * * * * *

The Joint Resolution of May 7, 1940, did not empower the United States to seize any proprietary interest in frozen funds. Confiscation was constitutionally forbidden. *Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481, 491-2. It was intended merely to protect the assets here of Axis-invaded countries and their nationals from seizure by the Axis at

gun point.[8] To this end the President was given the power to screen transactions in frozen property and to withhold sanction from those resting upon Axis conquest. Legitimate transactions were to be unaffected.[9] The frozen property was to be subject to the claims of Americans.[10]

Thus, Congress established the freezing controls as an instrument to be used solely against Axis aggression. They were a check on the use of frozen property by the Axis—not a device to protect Axis funds from the legitimate claims of American citizens.

The Joint Resolution did not purport to restrict in any way the right of an American citizen to sue a blocked national *in personam* or by attachment of his funds. To

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[8] The Joint Resolution was offered in Congress by Senator Wagner, Chairman of the Committee on Banking and Currency, which had reported out of the Resolution. In his own words,

"* * * The purpose of the joint resolution, of course, is very clear. We want to protect property within the jurisdiction of the United States which is owned by these governments [Norway and Denmark] or their nationals" (86 Cong. Rec. 5006).

See also: Sen. Glass in 86 Cong. Rec. 5175-5176 and Sen. Connally in 86 Cong. Rec. 5007.

[9] "Mr. Wagner. * * * I wish to emphasize the point that *this does not absolutely prohibit the transfers, it merely provides that the Government may investigate* to determine whether the transfer was made voluntarily or under duress, to be perfectly candid. *If the transfer is voluntarily made, our Government, of course, will in no way interfere.* But where the transfer is induced, as can be easily established, by duress, we have a right to protect the national of any country against that sort of an imposition, using a very mild term, with respect to securities and other evidences of ownership subject to our laws" (86 Cong. Rec. 5007). (Italics supplied.)

"Mr. Wagner. *The joint resolution does not absolutely prohibit any transaction. It simply contemplates, if an Executive order is issued, that each transaction be scrutinized to determine whether it was bona fide or accomplished through duress.*" (Italics supplied.)

"Mr. Barkley. That is right" (86 Cong. Rec. 5175-5176).

[10] Senators Barkley and Wagner in 86 Cong. Rec. 5006.

imply such a restriction would be to proscribe in peace what was clearly permitted even during the exigencies of war. It is settled—both at common law and under the Trading with the Enemy Act—that, despite the existence of war, a citizen has the right to sue the enemy and to attach his property. *Watts, Watts & Co.* v. *Unione Austriaca Navigazione etc.*, 248 U. S. 9; *Trading with the Enemy Act*, § 7(b); 137 A. L. R. 1369, note. Nothing in the peacetime Joint Resolution indicates any purpose to reverse this wartime rule. [Cf. Sec. 5(b), as enacted during the First World War (40 Stat. 411 and 40 Stat. 966) with the Joint Resolution (48 Stat. 1).] In essence, this is conceded by respondent's stipulation that the attachment of frozen property "was not forbidden" by the freezing controls (IR 265) and that "a license to institute the action and levy the attachment was in fact not required" (IR 266).

Since the Joint Resolution permitted suit, including attachment actions, against blocked nationals or alien enemies, the German banks would have no standing to assert the freezing controls as a defense to petitioner's attachment. Respondent—as successor to the German banks—has no better right (*supra*, p. 34). In holding otherwise, the court below has unwittingly perverted the freezing controls from an instrument directed against German nationals to one designed for their protection. *Porter* v. *Freudenberg* [1915], 1 K. B. 857, 880.

B.

In authorizing the attachment of frozen funds, the Secretary of the Treasury must be taken to have sanctioned a valid attachment.

While, as just shown, the freezing controls did not embrace attachments of frozen funds, it would not matter here if the fact were otherwise. The Congressional Joint Resolution empowered the President to authorize transactions in frozen property, even if they were within the ambit of the Resolution. By Executive Order 8389, Sec. 7,

the President delegated this power to the Secretary of the Treasury. The manner in which the Secretary exercised this power in respect to the attachment of frozen funds is agreed upon here. The formal stipulation of fact in this case establishes the following:

1. From the inception of freezing controls the Secretary of the Treasury ruled that "the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action" (IR 265).

2. "A license to institute the action [by attachment] and levy the attachment was in fact not required by the Treasury Department" (IR 266).

3. In all cases in which litigants proposed to sue by attachment and applied to the Treasury for a license to attach, the Secretary made it clear that no license was necessary by a ruling or instruction of the following nature:

"Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national" (IR 263-264).

4. The Treasury at various times licensed payments out of frozen funds to satisfy judgments in attachment actions, "notwithstanding that a particular license to institute the action and levy the attachment was not procured by a plaintiff and judgment-creditor" (IR 266).

The Treasury construed its ruling to mean that frozen funds could be validly attached. As *amicus curiae* in *Comm. for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, the Treasury represented to the New York State Court of Appeals that "From the terms of the statement [quoted in the stipulation of fact here (IR 264)], it may be clearly seen that the Secretary of the Treasury authorized the bringing of an attachment action".[11] The Treasury advised the New York Court of Appeals to hold "that the Courts of the State of New York do have jurisdiction to litigate by attachment of blocked properties the rights and liabilities of litigants, consistent with the administration by the Federal Government of the freezing control laws."[11] The New York Court of Appeals so held in the *Polish Relief* case.

Respondent agrees. In his brief below (p. 24), he said:

> "Appellants stress throughout their briefs that a license was not required to institute a suit by attachment. Appellee concedes this and has so stipulated" (266).

This concession, we believe, is decisive of the case.

Since it is agreed that petitioner's attachment was permitted, petitioner's attachment levy under New York law effected (a) a seizure of the attached funds [N. Y. *Civ. Prac. Act*, Sec. 916, Subd. 3], and (b) the creation of a lien upon the attached funds to secure petitioner's state court judgment.[12] Both the Trading with the Enemy Act and the Fifth Amendment require that these vested rights of the petitioner be respected. *Trading with the Enemy Act*, Sec. 8; *Security First Nat. Bk.* v. *Rindge Land & Navig.*

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[11] Brief (p. 39) of Treasury Dept. as *amicus* in *Comm. for Polish Relief* v. *Banca Nationala a Rumanici*, 288 N. Y. 332.

[12] Resort must be had to New York law to determine the incidents of petitioner's attachment. *Clark* v. *Williard*, 294 U. S. 211, 213. The New York cases holding that an attachment impresses a lien on the attached property are cited *post*, p. 51, footnote 17.

Co., 85 F. 2d 557, 561; *Louisville Bk.* v. *Radford*, 295 U. S. 555; *Gunn* v. *Barry*, 82 U. S. 610, 622.

To avoid this result—implicit in his concession—respondent took the position below that, although the Secretary of the Treasury authorized an attachment under New York law, the attachment was null and void when levied. It would become validated *ab initio*, he argued, if and when plaintiff's judgment in the attachment action were licensed for payment.

No such attachment is known to New York law. In New York—as in almost all other states—an attachment to be good, must seize the property and impress it with a lien before the judgment—not later.

Respondent's view would require a wholesale revision of the law of attachment. The Treasury's ruling—stipulated to here—indicates no purpose so to revise the attachment law of New York or of any of the states. Nothing in the Joint Resolution of May 7, 1940 or in Exec. Order 8389 granted such legislative power.

In truth, the states could not so revise their attachment laws even if thus minded. *Pennoyer* v. *Neff*, 95 U. S. 714, 727, forbids a judgment resting upon an attachment which has the attributes suggested by respondent. Under *Pennoyer*, it is only because the attachment has seized the property and brought it under the control of the court *before* judgment, that the Federal Constitution permits an adjudication binding the property seized. The power of the court to adjudicate "at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment." *Pennoyer* v. *Neff*, *supra*, p. 728. To paraphrase *Pennoyer* v. *Neff*, *supra*, p. 728, "The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid" if licensed by the Treasury, under the freezing controls, "and void if there be" no license.

It must be assumed that the Treasury understood these constitutional requisites of a valid attachment. The Treas-

ury's ruling must be construed to have authorized an attachment which would fulfill those requisites, i.e., an attachment effective when levied. It cannot be construed to have authorized the courts to proceed in a manner which the Federal Constitution forbade. *Josephberg* v. *Markham*, 2nd Cir., 152 F. 2d 644, 659; *Fed. Trade Com.* v. *Am. Tobacco Co.*, 264 U. S. 298, 307.

On December 11, 1941—when petitioner attached—the freezing controls rested wholly on the Joint Resolution. On that date there was no administrative interpretation of the impact of the controls on attachments except that found in the Treasury's ruling stipulated to here. This ruling stated clearly that the freezing controls made "no attempt to limit" attachments (IR 264). This ruling, alone, expressed the Treasury's then view as to the force of the Joint Resolution.

Below respondent argued otherwise. He said, in effect, that Gen. Ruling No. 12—issued on April 21, 1942, in implementation of the controls—must be applied retroactively to determine the meaning of the freezing controls on December 11, 1941, when petitioner attached. We cannot agree. Gen. Ruling 12 may be applicable to attachments made after the Ruling was issued on April 21, 1942. It cannot, in any legitimate sense, be used as the guide for construing the Secretary's earlier ruling—found in the stipulation here—in execution of the restricted authority of the Joint Resolution. The latter was the sole Congressional authority for the controls when petitioner attached on December 11, 1941.[13] *Ex parte Endo*, 323 U. S. 283, 302.

We need not speculate as to the impact of Gen. Ruling 12 upon petitioner's attachment. It had none. Gen. Ruling 12 came on April 21, 1941—more than four months after petitioner had attached. Since it had the sanction

[13] Under the holding in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, even the First War Powers Act—enacted later—did not prevent the creation of valid rights in frozen funds as the result of unlicensed litigation.

of harsh criminal penalties (Exec. Order 8389, Sec. 8), the Constitution forbade its application retroactively to avoid petitioner's attachment. *Addy* v. *U. S.*, 264 U. S. 239, 244-245; *Chew Heong* v. *U. S.*, 112 U. S. 536.[14] This was fully appreciated by this Court, which said in *Propper* v. *Clark*, 337 U. S. 472, 485:

> "General Ruling No. 12, as it came after the suit by the receiver against ASCAP was started and after the order appointing petitioner as permanent receiver, is not treated by us as decisive in this case. It is useful only as a statement of the administrative determination as to the effect of the litigation without a license."

The validity of petitioner's attachment depends solely upon the impact of the freezing controls authorized by the Joint Resolution of May 7, 1940. These were the peacetime controls; there were then no others. The status of attachments under the Joint Resolution is explicitly defined by the Treasury's ruling as stipulated here. As interpreted by this ruling, nothing in the Joint Resolution or the Executive Order forbade petitioner's attachment.

Even if the Constitution did not forbid the retroactive application of Gen. Ruling 12, the ruling itself, properly construed, sanctioned petitioner's attachment on December 11, 1941. Subd. (3) of Gen. Ruling 12 provides that a transfer, if, at any time, licensed or **otherwise authorized** by the Secretary of the Treasury is "enforceable to the same extent as it would be valid or enforceable but for * * * section 5(b) of the Trading with the Enemy Act", Exec. Order 8389 and regulations issued thereunder. Since, concededly, petitioner's attachment was so authorized it is expressly validated by Gen. Ruling 12.

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[14] Apart from constitutional limitations, Gen. Ruling 12 could not be given retrospective force. Administrative orders and rulings, as well as statutes, are not construed to operate retrospectively. *Miller* v. *U. S.*, 294 U. S. 435, 439; *Standard C. & M. Corp.* v. *Waugh C. Corp.*, 231 N. Y. 51.

Further, subd. (4) of Gen. Ruling 12 expressly makes "valid and enforceable" any transfer involved in, or arising out of any court proceeding "for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated". In every attachment action the right of the Court to attach the property is necessarily one of the matters litigated and concluded by the judgment. *Ackerman* v. *Tobin*, 8th Cir., 22 F. 2d 541; *Green* v. *Van Buskirk*, 74 U. S. 139, 148. Therefore, the state court's judgment in favor of petitioner against the German banks was an adjudication, binding on the German banks, that the funds were validly attached. As respondent was in privity with the German banks, he is equally bound by the judgment in the attachment action.

Respondent ignored the language of subd. (3) and sought to give subd. (4) a different twist. He said, in his brief below (p. 19), that subd. (4), in permitting an adjudication of the rights and liabilities of the parties, must be read—due to the proviso—as insulating the property in litigation from any of the consequences of the litigation until the judgment is licensed. The difficulty with this construction of subd. (4) is that, in practice, it would bring about utterly conflicting consequences, dependent upon whether the litigation were *in personam* or *in rem*—a result wholly unintended by anything which appears anywhere in the Ruling.

The Ruling purports to permit actions competent validly to determine "the rights or liabilities therein litigated". Respondent's construction of the Ruling would not interfere with this purpose in the case of *in personam* actions. In such case, the personal service of the summons would provide the constitutional basis for a binding judgment fixing the rights of the parties. In such case, the validity of the judgment would in no way depend upon whether a post-judgment, unlicensed, judicial seizure, by execution, garnishment, etc., was effective to create an interest in frozen funds.

In the case of *in rem* actions, proceeding on constructive service, precisely the opposite would be true. In such cases

the constitutional prerequisite to a binding judgment fixing the rights of the parties is the judicial seizure, *in limine*, of the property to be dealt with by the judgment. This is because, where the action is *in rem*, the rights of the parties are determined only in respect to the property seized prior to the judgment.[15] If, as respondent contends, the proviso of subd. (4) precludes a valid pre-judgment attachment, no valid *in rem* judgment would be possible, despite the absence in Gen. Ruling 12 of any purpose to differentiate between actions *in rem* and actions *in personam*.

To construe the Gen. Ruling as authorizing a valid attachment of frozen funds for jurisdictional purposes is to make it valid and meaningful. To construe it as respondent contends is to make it illogical, contradictory and opposed to the dictates of the 14th Amendment.[16] Given this choice, the interpretation which is meaningful and constitutional should be adopted. *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16; *Texas & P. R. Co.* v. *U. S.*, 289 U. S. 627, 640; *U. S.* v. *La Franca*, 282 U. S. 568, 574; *Josephberg* v. *Markham*, 152 F. 2d 644, 659.

There were practical reasons why the Secretary of the Treasury, in authorizing the attachment of frozen funds, should have intended a valid attachment. His, alone, was the responsibility of issuing or withholding the license needed before frozen funds could be applied to satisfaction of the judgment recovered in the attachment action. It was to his interest—as well as to that of the litigants—that the judgment, payment of which was to be licensed, should have no patent infirmity.

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[15] The pertinent cases are cited at p. 49.

[16] *Pennoyer* v. *Neff*, *supra*. Also, under respondent's construction, Gen. Ruling 12 would appear to violate the Fifth Amendment as being too contradictory "to be intelligible". *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233; *U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81; *Standard C. & M. Corp.* v. *Waugh C. Corp.*, 231 N. Y. 51; *Weeds, Inc.* v. *U. S.*, 255 U. S. 109; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445. Cf. *U. S.* v. *Shreveport Grain & El. Co.*, 287 U. S. 77.

Such judgments, resting wholly on the attachment of frozen funds, would be patently void if frozen funds could not be validly attached. It is elementary law that a judgment in an attachment action is constitutionally binding only if property has been actually attached prior to the entry of the judgment and only to the extent of the property so attached. *Pennoyer* v. *Neff*, 95 U. S. 714, 727, 728; *Pennington* v. *Fourth Nat. Bk.*, 243 U. S. 269, 272; *Helme* v. *Buckelew*, 229 N. Y. 363, 371; *Matthews* v. *Matthews*, 247 N. Y. 32, 34.

By ruling that frozen funds could be validly attached, the Secretary removed all doubt as to the Constitutional validity of the judgment without impairing, in any way, his ability and right to screen the payment of the judgment for compliance with the policy underlying the freezing controls.

Both the Treasury and the Alien Property Custodian have licensed the transfer of attached frozen funds to satisfy judgments obtained in actions begun by unlicensed attachment of such funds (IR 266-269). Such action is inexplicable except upon the hypothesis that a valid attachment of frozen funds was permitted. Unless the attachment were valid, the judgment would be a nullity under *Pennoyer* v. *Neff*. It cannot be supposed that the Secretary, in ruling that a license was required to satisfy the judgment, meant to reserve the authority to license as valid payment of a judgment resting upon an attachment which would be a nullity under the construction of the controls attributed to him by respondent. The Treasury would have no occasion to license execution upon a void judgment. There would, indeed be nothing to license.

There is no basis in law or policy for permitting respondent, in effect, to revoke, retroactively, the explicit authority to attach frozen funds granted by the Secretary of the Treasury from the very inception of the freezing controls.

C.

Petitioner's attachment is clearly valid under this Court's holding in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*.

In *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, this Court affirmed the holding of the New York State Court of Appeals. The latter Court held that a voluntary unauthorized transfer of blocked Japanese funds gave rise to valid rights in the transferee, enforceable as a preferred claim against the assets of the Yokohama Specie Bank in liquidation. 293 N. Y. 542; 299 N. Y. 113; 299 N. Y. 139. The freezing controls, said the New York Court in amending its remittitur, "did not prevent the accrual or creation of the claim sued upon or render such claim void, but merely prevented the payment of the claim until an appropriate federal license is obtained * * *." 299 N. Y. 790 and 791.

This Court having affirmed in *Singer* and *Mellie Iran*, it was obligatory upon the Court below to hold that the freezing controls "did not prevent the accrual or creation of" petitioner's attachment lien or render such lien void, "but merely prevented the payment of the" judgment "until an appropriate federal license is obtained". In truth, petitioner's case is *a fortiori*. Concededly, petitioner's attachment was *authorized* by the Treasury whereas the transaction in *Singer* and *Mellie Iran* was *unauthorized*.

The Court below mistakenly assumed that this case was controlled by *Propper* v. *Clark*, 337 U. S. 472. The validity of such an assumption is destroyed by this Court's holding in *Singer* and *Mellie Iran* that the authority of the *Propper* case is limited to a "claim of title to frozen assets adversely to the Custodian", by one seeking "to deny the Custodian's paramount power to vest". 339 U. S. 841, 842-3. The instant case is distinguishable from the *Propper* case in both aspects.

(1) *Petitioner's attachment—in contrast to the receivership order in the Propper case—involved no claim of title. It created only the attachment lien required for in rem jurisdiction.*

Under New York law, the levy of an attachment impresses a lien upon the attached funds at the outset of the action.[17] In this way, the preliminary seizure, constitutionality necessary for *in rem* jurisdiction is achieved and the attachment action can proceed.[18] Title to the attached funds—despite the attachment—remains in the defendant.[19] Therefore, the attachment effects no transfer. There is no shift in title—as in *Propper* v. *Clark*—which requires the sanction of the Treasury under the Executive Order.

If the plaintiff in the attachment action recovers a judgment, the attached funds, when execution issues against them, are applied in satisfaction of the judgment (N. Y. *Civ. Prac. Act*, §§ 969, 645). If execution issues, then

[17] The effect of an attachment under New York law is well established. The levy of the warrant impresses a lien upon the attached property as "security for the judgment the plaintiff may recover." If the plaintiff recovers, "the lien becomes absolute, relating back to the time of the levy, and taking its priority from that date." *Fielmaier* v. *Brunner* (1st Dept. 1874), 2 Hun 354, 356; *Van Camp* v. *Searle* (5th Dept. 1894), 79 Hun 134, 143, mod. 147 N. Y. 150; *Lynch* v. *Crary*, 52 N. Y. 181, 184; *Embree* v. *Hanna*, 5 Johns. 101, 103; *Logan* v. *Greenwich Trust Co.* (1st Dept. 1911), 144 App. Div. 372, 378, aff'd 203 N. Y. 611; *West Virginia P. & P. Co.* v. *People's Home Journal, Inc.* (1st Dept. 1931), 233 App. Div. 376, 378; *Sanders* v. *Armour Fertilizer Works*, 292 U. S. 190, 208; *Elkay Reflector Corp.* v. *Savory, Inc.* (C. C. A. 2nd, 1932), 57 F. 2d 161; *Steingut* v. *Nat. City Bk.* (S. D. N. Y. 1941), 38 F. Supp. 451, 452.

[18] *Pennoyer* v. *Neff*, 95 U. S. 714, 727, 728, 733; *Security Savings Bk.* v. *California*, 263 U. S. 282, 287; *Pennington* v. *Fourth Nat. Bk.*, 243 U. S. 269, 272; *Helme* v. *Buckelew*, 229 N. Y. 363, 371; *Matthews* v. *Matthews*, 247 N. Y. 32, 34.

[19] *Klinck* v. *Kelly*, 63 Barb. 622; *Columbia Bank* v. *Ingersoll* (Sup. Ct. N. Y. 1888), 21 Abb. N. Cas. 241; *Starr* v. *Moore*, 22 F. Cas. No. 13315, 3 McLean 354. This is the rule generally. See 7 C. J. S., page 415.

only—for the first time in the attachment action—does title to the attached frozen funds become involved in the litigation. At the point of execution—and here alone—the freezing controls apply. It is the execution against the frozen funds which portends the change in title. It is the execution—not the attachment or judgment—which must be licensed under the Treasury's ruling. Until execution upon the judgment, there has been, and can be, no transfer of title as in *Propper* v. *Clark, supra.*[20] Here, it is conceded that execution has not issued (IR 20).

Since everything done by the state court, including entry of petitioner's judgment, was concededly authorized by the Secretary of the Treasury, since execution has not issued and since the parties are agreed that execution cannot issue without an appropriate federal license, it is clear that the proceedings in the state court have in no way impinged upon the federal controls. So this Court has held in the *Singer* and *Mellie Iran* cases. These cases—not *Propper* v. *Clark*—should have been followed below.

(2) *Only the rights of the German banks—not the Custodian's vesting power—is in issue here.*

Had the Custodian issued a "res" vesting order, seizing the attached bank accounts in their entirety, that order would have been incontestable (*supra*, p. 34).

Here, however, the Custodian chose to seize only the interest of the German banks in the attached accounts. The choice was deliberately made. The "right, title and interest" vesting order submits for judicial determination the extent of the enemy's interest in the seized property. Whether the Custodian chose this type of vesting order to obviate a later proceeding under Sec. 9 of the Trading with the Enemy Act or to secure a precedent for disposition of

[20] In the *Propper* case, the receiver not only claimed title to the New York assets of AKM, vested in him by the state court judgment, but sought to enforce that judgment by suing on it to compel ASCAP to pay to the receiver, without Treasury license, ASCAP's debt to AKM in satisfaction of the state court judgment.

the many similar attachment cases still pending, is unimportant here. Having chosen to enforce only the rights of the German banks, no issue is presented as to the paramountcy of the Custodian's vesting power. Only the rights of the German banks is at issue.

It is true, of course, that, if petitioner prevails and a federal license is ultimately issued, the *quantum* of the Custodian's seizure is diminished to the extent of petitioner's attachment lien. But the Custodian would have to respect that lien even if he issued a "res" vesting order, for under such a vesting order he would hold the seized property subject to petitioner's right to enforce his lien in a Sec. 9 proceeding. The vesting power is limited by the Fifth Amendment. The latter permits nothing less. *Miller* v. *Kaliwerke*, 283 Fed. 746, 757-758; *Commercial T. Co.* v. *Miller*, 281 Fed. 804, 806, aff'd 262 U. S. 51; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79; *Garvan* v. *$20,000 Bonds*, 265 Fed. 477, 479.

Essentially, this case is like *Singer* and *Mellie Iran*. In the latter, the Custodian vested the residue of the assets of the New York agency of the Yokohama Specie Bank, in liquidation, remaining after satisfaction of the claims allowed in the liquidation proceeding. The claims of *Singer* and *Banque Mellie Iran*, sustained by this Court, will necessarily diminish, *pro tanto*, the residue which the Custodian will take. Recognition of petitioner's attachment lien in this case would affect the Custodian in precisely the same way.

Since the Custodian's power to vest is not in issue here, there is no parallel between this case and *Propper* v. *Clark*.

The court below failed to observe that, in the *Propper* case, (a) this Court carefully premised its "determination on the purpose of Congress to prevent shifts in title to blocked assets," 337 U. S. 472, 486 and (b) this Court expressly refused to decide "whether every determination of rights concerning blocked property in unlicensed litigation is voidable." 337 U. S. 472, 486. The court below overlooked the fact that this Court very carefully limited

its holding to the particular facts of the *Propper* case and reserved for future decision the impact of the freezing controls in other cases. The rule for other cases has now been made in *Singer* and *Mellie Iran*. By these cases this Court has decided that the freezing controls permit a valid "determination of rights concerning blocked property" even though both the litigation and the transaction underlying it have not been authorized by federal authority so long as the adjudication is not consummated by a change of title. In the instant case, not only is title to the attached funds unchanged by the judgment but it is conceded that petitioner's attachment was authorized. For this reason, the instant case—even more than *Singer* and *Mellie Iran*—falls beyond the range of the *Propper* case.

III.

The District Court Should Have Refused to Entertain This Cause.

Six years before this proceeding was begun the state court, by an *in rem* judgment had adjudicated the rights of petitioner and the German banks—through whom respondent claims—in the attached accounts. The adjudication necessarily decided, as between petitioner and the German banks, that the bank accounts were attachable. *Ackerman* v. *Tobin*, 8th Cir. 1927, 22 F. 2d 541, cert. den. 276 U. S. 628; *Clark* v. *Williard*, 294 U. S. 211, 213.

The state court adjudication, being *in rem*, is binding in respect to the attached property, not only on respondent, who is in privity with the German banks, but upon the world as well. *In rem* judgments are not open to review in collateral proceedings. Restatement of the law, *Judgments* § 34, g; *Green* v. *Van Buskirk*, 74 U. S. 139, 149; *Schoenholz* v. *N. Y. Life Ins. Co.*, 192 N. Y. App. Div. 563; *Becher* v. *Contoure Laboratories, Inc.*, 279 U. S. 388.

In such circumstances, the District Court should have refused to decree the invalidity of the state court's seizure of the attached funds and its judgment which, under *Pennoyer* v. *Neff*, 95 U. S. 714, derived validity solely from that seizure. Such, under the law, is the measure of deference owed, as a matter of comity, between state and federal courts in contests over a *res* and, as a matter of right, under the full faith and credit clause of the Federal Constitution.

A.

The judgment below is an unlawful collateral attack on the state court judgment.

It is settled that the judgment of a court having jurisdiction, even if erroneous, may not be attacked in a collateral proceeding. Any errors leading to the judgment must be corrected by the court which rendered the judgment or by appeal therefrom. The rule applies to judgments *in rem*, based on attachment, as well as those *in personam*. *Cooper* v. *Reynolds*, 77 U. S. 308, 319; *Mellen* v. *Moline Iron Works*, 131 U. S. 352, 367; *Denman* v. *McGuire*, 101 [illegible] 161; *Van Camp* v. *Searle*, 147 N. Y. 150.

[illegible]s clear that petitioner's judgment against the German banks bound the attached bank accounts. Whether rightly or erroneously, the bank accounts were seized and in the custody of the court. N. Y. *Civ. Prac. Act*, § 916(3). Respondent tacitly recognized this fact, when he disavowed all right to money judgment against the Chase Bank so long as the attachment levy stood. Here—in contrast to his method in *Propper* v. *Clark*—he chose merely to seek an adjudication that the state court judgment was invalid. His position is, in essence, that although the state court seized the bank accounts, it should not have done so.

Such an attack challenges—not the power of the state court to deal with the attached funds but—the propriety of its having done so. *Grant* v. *Leach & Co.*, 280 U. S. 351, 359; *Chandler* v. *Peketz*, 297 U. S. 609.

Of such an attack the Supreme Court, speaking through Brandeis, J., said in *Lion Bonding & S. Co.* v. *Karatz*, 262 U. S. 77, 90:

> "* * * But if the legality of the state court's action was to be questioned, it could be done only by laying the proper foundation through appropriate proceedings in that court. * * * If such action had been taken and relief had been denied there, resort could then have been had to appellate proceedings. *Wiswall* v. *Sampson*, 14 How. 52, 14 L. ed. 322. But the judgment of the state court, which had possession of the *res*, could not be set aside by a collateral attack in the federal courts. *Mutual Reserve Fund Life Asso.* v. *Phelps*, 190 U. S. 147, 159, 160, 47 L. ed. 987, 995, 23 Sup. Ct. Rep. 707. Nor could it be ignored. *Shields* v. *Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570. Lower federal courts are not superior to state courts."

The judgment of the state court in petitioner's attachment action was binding until set aside in a direct proceeding. The power of the District Court was coordinate with—not superior to—that of the state court. Under the *Karatz* case it was bound to respect the judgment of the state court, not review it. This obligation follows from judicial precedent. *McLain* v. *Lance*, 5th Cir., 1944, 146 F. 2d 341, 345; *Leadville Coal Co.* v. *McCreery*, 141 U. S. 475, 477; *Nougue* v. *Clapp*, 101 U. S. 551; *Peck* v. *Jenness*, 7 How. (U. S.) 612, 624-625.

It follows, too, from the solemn injunction of the full faith and credit clause of the Federal Constitution. *U. S. Constitution*, Art. IV, Sec. 1; 28 *U. S. Code*, § 687; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 166; *Milwaukee County* v. *White Co.*, 296 U. S. 268; *Sanders* v. *Armour Fertilizer Works*, 292 U. S. 190; *Green* v. *Van Buskirk*, 74 U. S. 139; *Steingut* v. *National City Bank*, 38 F. Supp. 451; *Ackerman* v. *Tobin*, 8th Cir., 1927, 22 F. 2d 541; *Loewe* v. *Savings Bank of Danbury*, 2nd Cir., 1916, 236 F. 444, 448.

Since the German banks could not collaterally attack the state court's judgment, it was not open to respondent—their privy—to do so. *Mitchell* v. *First Nat. Bank*, 180 U. S. 471, 481; *Bigelow* v. *Old Dominion Copper Min. & S. Co.*, 225 U. S. 111, 129.

B.

The judgment below interferes with the state court's custody and control of the attached debts in violation of the traditional rule of comity between state and federal courts.

For almost a hundred years it has been the settled rule of comity that, "when a state court and a court of the United States may each take jurisdiction of a matter [involving a *res*], the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted." *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 231; *Freeman* v. *Howe*, 24 How. 450. The rule is one of right. It arises from the necessity, in a federal system such as ours, of avoiding unseemly conflicts between our independent state and federal tribunals. The Supreme Court has acknowledged a "long recognized duty * * * to give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the states and of the Union, so that they may cooperate as harmonious members of a judicial system coextensive with the United States'." *U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 477.

The rule binds the Government even when pursuing a federal right. *U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 479.

The state court was the first to take jurisdiction. The Sheriff, in levying petitioner's attachment, acted as an officer of the state. *Stojowski* v. *Banque de France*, 294 N. Y. 134, 135. By his levy, the state "seized" the attached debts.[21] N. Y. *Civ. Prac. Act*, §916 (3). The debts were then impressed with a lien to secure petitioner's recovery.

[21] The seizure was constructive since intangibles are not capable of manual seizure. In law, such a seizure is the equivalent of a manual seizure. *Comm. for Polish Relief* v. *Banca Nationala a Rumaniei*, 262 App. Div. 543, aff'd 288 N. Y. 332; *Security Savings Bank* v. *California*, 263 U. S. 282, 286; *Harris* v. *Balk*, 198 U. S. 215, 222, 223.

(See cases cited, supra, p. 51, footnote 17). The Chase Bank was bound by the seizure and lien. The statutory injunction forbade it "to make or suffer, any transfer or other disposition of, or interfere with * * * or pay over or otherwise dispose of any debt so levied upon * * * to any person, or persons, other than the sheriff serving" the warrant "except upon direction of the sheriff or pursuant to an order of the court". N. Y. *Civ. Prac. Act*, § 917 (2). Disobedience by the Chase Bank would have meant fine and imprisonment as for a contempt. N. Y. *Judiciary Law*, §§ 750(3), 753(3), (8). And the sheriff was empowered to sue to compel payment of the debt to him. N. Y. *Civ. Prac. Act*, § 922.

By this constructive seizure, the state court took exclusive custody and control of the attached debts. *U. S. of Mexico* v. *Schmuck*, 294 N. Y. 265, 268; *Cooper* v. *Reynolds*, 10 Wall. 308, 316, 317; *Beardsley* v. *Ingraham*, 183 N. Y. 411, 420. Exclusive jurisdiction over the *res* so obtained continues in the state court "until its duty is fully performed, and the jurisdiction involved is exhausted." *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 231. Here this event would occur only when petitioner's judgment was satisfied out of the attached funds. N. Y. *Civ. Prac. Act*, §§ 645, 520; *U. S. of Mexico* v. *Schmuck*, 294 N. Y. 265, 268.

With the attached debts so firmly lodged in the custody of the state court, it is clear that respondent could not have sued in the District Court for a money judgment. *U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463. Respondent must have been cognizant of this bar when he chose to sue here for declaratory relief only. Did this choice of remedy reconcile the proceeding with the traditional rule of comity between state and federal courts? We believe not.

Respondent's position, as stated in his brief in the District Court, was that "only a declaration of rights" was sought. No order was asked "directing that the funds be surrendered to him." He admitted, however, that the declaration sought "will interfere with the possession of

the state court * * * to the extent that in later appropriate proceedings the state court will be bound to recognize the rights adjudicated here." This is to say that, by reason of the District Court's decree, the state court must void its custody and surrender the *res*. It is precisely this—an adjudication of the state court's title—which the rule of comity was designed to prevent. *Ex parte Baldwin*, 291 U. S. 610, 616; *Lion Bonding & S. Co.* v. *Karatz*, 262 U. S. 77, 89; *Peck* v. *Jenness*, 7 How. (U. S.) 612, 624-626.

The issue tends to be obscured here because the seizures were symbolic.[22] Petitioner's seizure rests upon the declaration of the statute, fortified by injunction. N. Y. *Civ. Prac. Act*, §§ 916(3), 917(2). Respondent's seizure rests upon his declaration, i.e., his vesting order and demand. Since both seizures rest upon declarations, they can be rescinded by declarations. The District Court has done precisely this. Disregarding the State Court's injunction, it has rescinded the State Court's seizure by declaring that none occurred, leaving respondent's seizure fully effective. That we are dealing here with symbolisms, should not obscure the fact that the District Court, by nullifying petitioner's attachment, has, in practical effect, laid its hand upon the property in dispute. It is this which the rule of comity forbids.

Markham v. *Allen*, 326 U. S. 490, does not hold otherwise. There, only rights *in personam* were involved. The Custodian did not—as here—attack the decree of probate or the right of the State Court to administer the estate. He recognized the validity of the State Court judgment and merely asked that he be permitted to take the fruits of it.

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[22] The Custodian's vesting order and demand were an *ex parte* seizure of the bank accounts in question. *Great Northern Ry. Co.* v. *Sutherland*, 273 U. S. 182, 191; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, 55. His application to the District Court was merely in aid of "the seizure which he effected at the time of his demand." *Miller* v. *Kaliwerke, etc.*, 2nd Cir., 283 F. 746, 752.

Petitioner's attachment was also an *in rem* seizure. *Pennoyer* v. *Neff*, 95 U. S. 714, 727; N. Y. *Civ. Prac. Act*, § 916(3).

This distinction is decisive. *U. S.* v. *Klein*, 303 U. S. 276, 282. *Markham* v. *Allen* would parallel the instant case only if in *Markham* the Custodian had premised his claim upon the invalidity of the executor's title or the nullity of the State Court's probate decree.

The vice of the decree below is not cured merely because the decree is declaratory and does not direct the Chase Bank to pay the attached debts to respondent. If the decree stands, *res adjudicata* will leave the state court no choice, as respondent himself notes, except to surrender custody of the attached debts so that they may be paid to respondent. The overtones of a plea of res adjudicata may seem gentler than the harsh directive of an order to pay. In actuality, the compulsion of the one is equally as forceful, ultimately, as that of the other. Whichever means is employed the end is the same—the state court is forced to surrender its jurisdiction. Neither method concedes to that court the respect which the rule of comity requires.

Since the State Court was the first to take jurisdiction here, the District Court, in obedience to the rule of comity, should have remitted the Custodian to that forum. The State Courts have shown themselves fully competent—and indeed, eager—to accord the Custodian every right to which he is entitled. *Matter of Viscomi*, 270 N. Y. App. Div. 732; *Stern* v. *Newton*, 180 N. Y. Misc. 241. Therefore, the breach of comity here cannot be excused by any plea of necessity.

C.

Declaratory relief should have been denied because respondent had an adequate and summary remedy in the prior state court proceeding.

For some unstated reason, respondent chose to test the validity of petitioner's attachment in the District Court. Ever since the warrant was levied, the state court has been —and still is—open to a summary application by respondent to test the validity of petitioner's attachment. N. Y.

Civ. Prac. Act, § 948. Had respondent chosen so to act he could have obtained in one stroke, if so entitled, an adjudication of his title and a surrender by the state court of its custody of the attached accounts. On such an application, the state court, equally with the District Court, would have been bound to enforce the Federal law. *U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 479.

As matters stand, respondent, as he admits, must even now apply to the state court to surrender its custody in order to enforce the rights decreed below. Upon such an application, the state court may well inquire whether, under the full faith and credit clause of the Constitution, it is bound to recognize the judgment of the District Court as against its own. *Peck* v. *Jenness*, 7 How. (U. S.) 612, 624-626; *Leadville Coal Co.* v. *McCreery*, 141 U. S. 475-477; *Nougue* v. *Clapp*, 101 U. S. 551.

By choosing two proceedings to accomplish that which might have been done on one application to the state court, respondent has multiplied the litigation. Even more, he has needlessly pitted the District Court against the state court. The District Court should have refused to entertain this cause. *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491; *Carbide & Carbon C. Corp.* v. *U. S. I. Chemicals*, 4th Cir. 1944, 140 F. 2d 47; *McLain* v. *Lance*, 5th Cir. 1944, 146 F. 2d 341.

CONCLUSION

It is respectfully urged that certiorari be granted.

Respectfully submitted,

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